

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 26, 2007 Session

STATE OF TENNESSEE v. CHARLES RAY HARVEY

Appeal from the Criminal Court for Scott County
No. 8095 E. Shayne Sexton, Judge

No. E2006-00882-CCA-R3-CD - Filed March 4, 2008

The defendant, Charles Ray Harvey, appeals his conviction for first degree murder, for which he was sentenced to life. The defendant claims (1) that the trial court erred in denying his motion to suppress, (2) that the trial court erred in denying his motion for new trial on the basis of newly discovered evidence, and (3) that he was prejudiced by the trial court's mid-trial reversal of a previous ruling on a motion in limine. We affirm the defendant's conviction.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and D. KELLY THOMAS, JR., JJ., joined.

John G. Mitchell, Jr., Edward L. Holt, Jr., and Darwin K. Colston, Murfreesboro, Tennessee, for the appellant, Charles Ray Harvey.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; William Paul Phillips, District Attorney General; John W. Galloway, Jr., Deputy District Attorney General; and Sarah H. West Davis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case involves the murder of the defendant's son-in-law. The body of the victim, Armando Laredo, was found in the New River.

Agent Steve Vinsant of the Tennessee Bureau of Investigation testified that he assisted the Scott County Sheriff's Department in the investigation of the victim's death. He said he viewed the victim's body on July 18, 2003, after it was recovered from a river. He said he took Vanessa Laredo, who was the victim's wife and the defendant's daughter, the defendant, and Donna LaBoy into custody and interviewed them on July 23. He said the defendant initially denied that he had ever met

the victim and that the victim had ever been to his house. He said the defendant told him that Ms. Laredo had visited the defendant "in the days prior" with a boyfriend and had gone to Carmel, Indiana afterwards until her return on July 22. He said after interviewing the defendant for a short time, he interviewed Ms. Laredo and Ms. LaBoy. He said he then confronted the defendant with Ms. LaBoy's statement that the defendant had admitted to her that he killed the victim and Ms. Laredo's statement that she witnessed her father shoot and kill the victim. He said the defendant then stated that Ms. Laredo shot the victim.

Kenneth Robbins testified that he was retired from his former employment as a jailer but that he still worked part time when needed. He said he fingerprinted the defendant in August 2002 and identified the fingerprint card. He said the defendant initiated a conversation with him on July 30, 2003, in which the defendant said the victim had been assaulting Ms. Laredo and that when the defendant attempted to separate the two, the defendant saw the victim had a knife, spun the victim around, and shot him.

Robert Carson testified that he was the chief detective for the Scott County Sheriff's Department and that he investigated the victim's death. He said he received a telephone call on a Friday afternoon from Gary Burchfield regarding a body Mr. Burchfield and his friends discovered while fishing. He said he and Detective Wade Chambers went to the scene at the New River. He said they located the body, which was submerged in twelve to eighteen inches of water near the center of the river. He said that the body was weighted with rocks and cinder blocks and that it took four people about an hour and a half to remove the body from the water. He said the body was in "pretty bad shape" and had signs of fish feeding. He said it appeared to have been in the water about a week. He said the body was taken to the ambulance service in Oneida. He said they cleaned the body and determined that a chain was locked around the neck of the body and that the chain was attached to a block or a rock and that other rocks and blocks were tied to the body, as well. He said the body was later transported to UT Medical Center for an autopsy. He said the body was identified through fingerprinting as that of the victim.

Detective Carson testified that he was involved with interviewing the defendant and Ms. Laredo on July 23. He said the authorities obtained a search warrant for the defendant's home after the interviews. He said that the officers encountered Donna LaBoy at the home and that she gave her consent for the search, as well. He said that during the search, the officers were looking for any evidence of the crime, including rope, blue paint, a boat, a gun, bullets, and casings. He said a gun was not found but other items were, including rope, string, a barrel with blue paint, and a boat with blue paint. He explained that blue paint was of interest because there had been blue paint on some rocks at the crime scene.

Detective Carson testified that he returned to the defendant's home on July 26 after Ms. LaBoy provided some additional information to the authorities. He said that Ms. LaBoy gave consent for a search of the residence and that he found the "murder weapon," a shoulder holster, and ammunition buried in a can behind the well house that was behind the home. He said the can was a "military ammo can" and was inside two white garbage bags. He identified the weapon as a nine

millimeter Beretta semiautomatic handgun. He said the defendant was in jail when this search was conducted.

Detective Carson testified that Ms. LaBoy brought a key to the authorities on July 30. He said the key fit the lock that had been on the chain around the victim's neck.

Detective Carson testified that he was involved in the interview process with respect to Ms. Laredo and that she told conflicting stories. He said that the conflicts in her statements did not pertain to the identity of the person who shot the victim but that she admitted in her later statement that she knew before going to the river what was going to happen. He said she was arrested within a day or two of her second interview.

Detective Carson identified two letters he received in the investigation. He said he obtained them from the defendant's sisters, Linda Overton and Roshona Crabtree. He read the letter he received from Ms. Crabtree, in which the defendant asked Ms. Crabtree to get \$8,000 from their mother in order to pay a hit man to kill Vanessa Laredo and Donna LaBoy. The letter stated that Ms. LaBoy was going to be killed first because she was providing information to the district attorney. It also provided information about where and to whom the money should be sent. Detective Carson also read the letter the defendant wrote to Ms. Overton, which stated that she should send \$8,000 and provided a name and address. The letter stated that the person to whom the money was sent would pay the hit man. The defendant stated in the letter that he thought Donna was "going to help work me over in court up there" and then was going to move on with her life. The defendant stated in the letter that Vanessa, not he, shot the victim after he had struggled with the victim.

David Hoover, a forensic scientist with the Tennessee Bureau of Investigation, testified as an expert in latent fingerprint examination. He said he identified a latent fingerprint on the side of the "ammo box" as matching the defendant's left thumb. He said he was unable to find identifiable fingerprints on any of the items inside the box or the white plastic garbage bags. He said he also examined two letters submitted and found the defendant's latent fingerprints on them.

Kelvin Woodby, a forensic scientist with the Tennessee Bureau of Investigation, testified as an expert in serology and DNA comparison analysis. He said he recovered human blood from three places on a boat that was stored at the Scott County Jail. He was unable to obtain a DNA profile from any of the samples.

Detective Randy Lewallen testified that he was a deputy with the Scott County Sheriff's Department. He said he helped recover the victim's body from the New River. He said this was a difficult task due to the rocks that were tied to the body. He identified the rocks, blocks, ropes, chain, lock, and bullet that were recovered from the victim's body. He said that Donna LaBoy admitted that she had tied a web of knots around one of the rocks.

Steve Scott of the Tennessee Bureau of Investigation testified as an expert in firearms examination, ballistics, and firearms ammunition comparison. He said he examined a gun and bullet

in connection with the investigation of the victim's death. He identified the weapon as a Beretta semiautomatic nine millimeter pistol. He said the bullet had been fired from the gun. The bullet had been taken from the victim's head during the autopsy, and the gun had been identified as being the one exhumed during the second search of the defendant's property.

Doctor Darinka Mileusnic-Polchan testified as an expert in forensic pathology. She said she performed the autopsy of the victim on July 19, 2003. She said the body had strings and chain around the wrists, neck, and ankles. She said the body was in poor condition due to having been submerged in water and from decomposition. She said that the primary injury was a gunshot wound to the head and that a bullet was recovered from the victim's head. She said the bullet entered the back left of the victim's head. She said the gun was in close proximity to the victim's head when the bullet was fired, although she could not determine whether it was "loose contact" or "tight contact."

Donna LaBoy testified that she met the defendant in August 2002 and moved into his home later that year. She said she lived there until the defendant's arrest in July 2003. She said she met the defendant's daughter Vanessa on July 5, 2003, with Vanessa's Hispanic boyfriend named Joe. She said Vanessa claimed to be separated from the victim. She said that Vanessa and Joe stayed overnight and that she next saw Vanessa on July 8 when she came to the home with the victim. She said that on July 7, she had heard the defendant talking on the phone with Vanessa and overheard the defendant say "to get him down here and that they would take care of him and she wouldn't have to worry about him anymore." She said she heard the defendant tell Vanessa that she should tell the victim that they could come to live in Tennessee and that the defendant would hire the victim to work in his garage. She said the defendant hung up the phone and said to her, "I've got to do something really bad," and then told her that he was going to kill the victim. He said Vanessa and the victim arrived at the house about ten minutes later. She said that after a while, Vanessa and the defendant went outside alone. She said the defendant, Vanessa, and the victim were preparing to go camping and fishing when a family arrived unexpectedly to visit. She said the family stayed for a couple of hours and that during their visit, she went inside the house and saw the victim with his hands around Vanessa's neck. She said she later observed the two of them coming out of the bathroom and saw that Vanessa had a handprint on her face. She said Vanessa told her a few minutes later that the victim was mad because she had started her period and was not pregnant.

Ms. LaBoy testified that she, the defendant, Vanessa, and the victim left in her truck after the visitors left. She said that they took a boat and supplies and that the defendant had a rifle and a nine millimeter Beretta with him. She said the defendant wore the Beretta in a shoulder holster underneath a tee shirt and a jacket to conceal it from the victim. She identified the Beretta in evidence as the one the defendant took with him. She said the defendant told her to pack extra clothes for him because he would need them after he killed the victim.

Ms. LaBoy testified that when they got to the river, they launched the boat. She said that she left and went home and that the plan was for her to meet them at the same location at nine o'clock the next morning. She said she was scared and called a friend in Kentucky that night. She said that

she picked up Vanessa and the defendant the next morning and that the defendant told her they had killed the victim. She said that after they returned home, the defendant told her that he shot the victim in the head and that they had tied rocks to his body and belt loop and thrown him into the New River. She said that as they were eating breakfast, the defendant and Vanessa both claimed to have killed the victim. She said the defendant and Vanessa burned the victim's clothing, some of the camping gear, life jackets, and the seats from the boat. She said the defendant put the ashes in a bag and disposed of them in a dumpster.

Ms. LaBoy testified that Vanessa drove the victim's car to Illinois. She said she and the defendant went with Vanessa in Ms. LaBoy's truck. She said that Vanessa left the car in a corn field, that the defendant and Vanessa "wiped it down," and that the defendant poured gasoline on it. She said the defendant, who had a gun, forced her to ignite the car.

Ms. LaBoy testified that the three of them went to Vanessa's apartment in Carmel, Indiana, where they spent the night, retrieved Vanessa's possessions, and picked up her paycheck. She said they drove to Kentucky and disposed of the license plate from the victim's car in a river. She said they then returned home to Scott County.

Ms. LaBoy testified that the three of them went to the river with the boat. She said Vanessa and the defendant attempted to move the body in the river. She said the defendant told her that Vanessa was unable to "handle it" and insisted that she must help him. She said that she went with the defendant in the boat and that the defendant tied concrete blocks to the body and threw the blocks overboard, almost sinking the boat because he had tied the body to the boat. She said the defendant took rope, chain, and a padlock from the house to the river. She said that the defendant had purchased some of the rope before the murder and that she had purchased other rope at the defendant's request after the murder.

Ms. LaBoy testified that she and the defendant made another trip to the river. She said that the defendant wanted to weight the body if it was floating and that it was. She said the defendant had her tie ropes into a web around a rock.

Ms. LaBoy testified that the defendant and Vanessa discussed saying that Vanessa's boyfriend Joe killed the victim in Indiana and brought the body to Tennessee and disposed of it in the river. She said Vanessa also discussed saying that the victim was involved with drugs and had been killed by a drug dealer.

Ms. LaBoy testified that she and the defendant were in Clinton taking Vanessa to her mother's apartment when the defendant was arrested. She said she was allowed to drive her truck to the Campbell County Jail, where she was interviewed but not arrested.

Ms. LaBoy said that she visited the defendant in jail and that he drew a map and told her and the defendant's sister where the gun was buried. She said he asked them to take the gun out of state and destroy it. She said that the map indicated the gun was behind the well house and that she had

not known this. She said the defendant ate the map. She said that they agreed to dispose of the gun but that she called the 9-1-1 center and requested that the authorities meet her at her house because she knew where the gun was located. She said the authorities arrived and found the gun in the location the defendant had identified. She said she found some keys and some of the victim's belongings and provided those to the authorities.

Ms. LaBoy testified that she continued to visit the defendant while he was in jail and that they wrote letters to each other. She said she acted like she was "madly in love" with the defendant but that he had "messed up [her] whole life."

Ms. LaBoy testified that she and the defendant learned that the victim's body had been discovered by fishermen when they heard it on a police scanner. She said they had planned to buy Quikrete later that day and take it to the river to weight down the body.

Ms. LaBoy read portions of letters she received from the defendant. In one, he asked her to say that she was at the river when the victim was killed. He proposed that she either say that Vanessa shot the victim or that the defendant did so when the victim attacked Vanessa and him with a knife. In another, he asked Ms. LaBoy to help him in court. He said he did not kill the victim. He proposed that they say that Ms. LaBoy was present for the murder but that she had a panic attack and that none of them planned for it to happen. In a third letter, the defendant told Ms. LaBoy that she should say that the victim attacked Vanessa at the river, leaving a tooth mark on her, and that Vanessa killed the victim. In another excerpt, the defendant expressed his consternation with Ms. LaBoy for telling the authorities about the gun. He stated that Vanessa had her own gun at the river that night. In another letter, the defendant asked whether Ms. LaBoy was willing to lie on the stand for him and requested that she write back using a numerical code to answer the question.

On cross-examination, Ms. LaBoy maintained that she saw the defendant with the nine millimeter Beretta before he left with the victim and Vanessa, despite her inconsistent testimony at the preliminary hearing. She said that the defendant had been so insistent that she had been at the river that he "pretty much had [her] to the point that he was making [her] believe anything he said." She maintained, however, that she had not been at the river. She said she wanted to believe that the defendant would not kill anyone. She admitted that she took medication for anxiety and panic attacks but claimed she did not have memory problems unless she was having a panic attack. She admitted that she had taken medicine for her anxiety on the day Vanessa and the victim came to her house and that she drank one or two beers. She said she was "overmedicated" with six to twelve Hydroxypam pills on the day of the preliminary hearing because she was claustrophobic and had been "closed up back there in a room." She said the prescribed dosage was three pills a day.

Ms. LaBoy testified that she had been charged in connection with the victim's murder. She said, however, that the state had not promised her anything in exchange for her testimony. She said she did not call the police after dropping off the defendant, the victim, and Vanessa at the river because the defendant told her that if the police came to the river he would come to the house and kill her. She denied that she was the person who buried the gun. She admitted that she wrote letters

to the defendant in jail expressing her love for him and blamed it on “[s]tupidity.” She admitted she had testified at the preliminary hearing that Vanessa had an opportunity to go inside the house and retrieved the defendant’s gun before going to the river, but she said she knew the defendant had the gun on his person when they left.

Ms. LaBoy testified that the defendant had placed his nine millimeter gun and his ammunition in an “ammo box” and had her get two garbage bags in which to place the box. She said that night she was awakened by the defendant, who told her not to go outside or look out the windows. She said she stayed in bed. She said that later the defendant confronted her and questioned whether she had watched him.

Ben Johnson testified that he was driving in Jefferson County, Illinois on July 10, 2003, when he was nearly hit by a white Chevrolet truck that drove out of a field without stopping. He said there were three people inside the truck. He noticed a fire down the lane but proceeded on to his father’s house for dinner. He said he told his father about the fire and that his father went to the fire on his four-wheeler.

Bill Johnson testified that his son and his son’s girlfriend came to his house for dinner on July 10, 2003. He said that after speaking with his son, he rode his four-wheeler up the road and saw a burning car, which he described as having two doors and being bluish gray. Jefferson County, Illinois Sheriff’s Deputy Scott Smith testified that he responded to the scene of a car fire on July 10, 2003. He said the car was on a dead-end road and that it was so badly burned that he was unable to find a vehicle identification number. Fred Brown testified that he was an investigator with the Illinois Secretary of State Police and that he assisted in the investigation of the burned car. He said that he located the vehicle identification number and that it matched a 2003 two-door Chevrolet Cavalier registered to the victim.

The defendant’s sister, Linda Overton, testified on his behalf. She said she received two letters from the defendant but did not open them. She said she had received and opened other letters from the defendant but that she had not picked up her mail to retrieve the two letters until after she was questioned by the authorities. She said the officers who questioned her humiliated her in her workplace. She said she told the officers she would retrieve and turn over the letters. She identified the handwriting in a third letter as looking like the defendant’s.

The defense recalled Detective Lewallen, who testified that he transported the defendant to Riverbend Prison on October 2, 2003. He said that he attempted to prevent the defendant from talking to him but that the defendant was insistent upon doing so. He said the defendant told him that his daughter Vanessa was the person who shot the victim. He said the defendant stated that his gun was damaged when Vanessa was startled and dropped the gun on rocks. He said the defendant requested that he ask Detective Carson to check the gun for the damage. He said the defendant stated that the gun was an expensive, limited edition weapon and that if he were going to shoot someone, he would not use it. He said the defendant stated that he did not know the gun was at the scene until

his daughter pulled it out. He said the defendant told him that he had recently become acquainted with his daughter after many years of not having contact with his children.

Vanessa Laredo testified that she was married to the victim. She said the victim had been physically abusive to her when he was drinking. She said that they had been separated at times due to his abusiveness and that he had been arrested once for the abuse. She said her parents divorced when she was twelve or thirteen and that visitation with the defendant ceased after an incident between her parents in which the defendant ran her mother off the road. She said she next saw her father when she was about nineteen years old. She said she talked to the defendant by telephone after her brother told her the defendant had changed and that she saw the defendant on July 5, 2003, when she was with Joel Comingo. She said she was separated from the victim at the time. She said after she returned to her home in Indiana, the victim broke into her apartment and assaulted and raped her on July 6 or 7. She said that she called the defendant and that he said he would "take care of it" if she would bring the victim to Tennessee. She said the defendant did not explain what he meant. However, she admitted that she came to understand that he meant he was going to kill the victim and that she did nothing to stop him.

Ms. Laredo testified that she thought she arrived in Scott County with the victim on July 7. She said that she and the defendant did target shooting that day. She said she shot the defendant's shotguns but not a pistol. She said that while they were at the defendant's house, the victim choked her for wearing a pair of shorts of which he disapproved and slapped her for refusing to have sexual relations with him.

Ms. Laredo testified that she went to the river with the defendant and the victim. She said Ms. LaBoy drove them to the river and left in her truck. She said that as they were putting the boat in the water, the defendant told her that her problems would be over in a few hours. She said they went down the river in the boat. She said that they set out fishing poles and that the defendant and the victim drank beer and ate watermelon. She said they stayed in the same location for an hour or two and then went down the river. She said they went to shore but did not set out fishing poles this time. She said that at about 7:30 a.m., she and the victim were skipping rocks when the defendant shot the victim. She said she turned and saw the defendant putting a pistol into a holster under his shirt. She said she had known there was a shotgun on the trip, but she had not known about a pistol. She denied that she had ever told anyone that she was the person who shot the victim. She said there was no altercation during the trip to the river in which the victim was abusive to her. She denied that either she or the defendant had struggled with the victim. She said the victim did not have a knife. She said that she had bite marks on her chest but that they were from the sexual assault that had taken place in Indiana.

Ms. Laredo testified that after the defendant shot the victim, the defendant told her to get into the boat. She said the defendant washed blood off the bank and put the victim's body and some rocks into the boat. She said the defendant covered the victim's body with a blanket and said, "Look at him. That's the kind of man that would have killed you one day." She said the defendant tied rocks to the victim's body and pushed him into the river. She said they paddled down the river to

a bridge, where they took the boat out of the water and waited for Ms. LaBoy to pick them up. She said Ms. LaBoy did not ask about the victim's whereabouts.

Ms. Laredo testified that they did not talk about what happened when they returned to the defendant's house. She said that the defendant told her they needed to dispose of the victim's possessions and that they burned them in the back yard. She said that she thought she called Mr. Comingo several times that day and told him she wanted to come back to Indiana but that she did not tell him what had happened.

Ms. Laredo testified she gave a statement on July 23 and gave a second statement a few days later. She said her first statement was not truthful. She said that she was charged with the defendant and that she was pleading guilty. She denied that she shot the victim.

Ms. Laredo testified that she went with the defendant and Ms. LaBoy to Illinois to burn the victim's car and that they also went to Indiana. She said that on this trip, the defendant threw the license plate from the victim's car into a river in Kentucky.

The defendant testified that he was honorably discharged from the Army and had worked various jobs until becoming a truck driver. He said that he met Donna LaBoy in August 2002 and that she moved into his home in March 2003. He said he had seven children, one of whom was deceased. He said he had divorced Vanessa Laredo's mother when Vanessa was twelve or thirteen years old and that other than going to visit Vanessa at her workplace one time, he had no relationship with her until Father's Day, 2003. He said Vanessa called him on Father's Day and they discussed going fishing. He said he and Vanessa talked again and made arrangements to see each other when Vanessa planned to be in Tennessee for July Fourth.

The defendant testified that Vanessa and her boyfriend Joel visited overnight on July 5. He said that Vanessa and Joel slept in the bedroom he normally shared with Ms. LaBoy and that his nine millimeter Beretta was kept in the nightstand in that room. He said he was unaware at this time that Vanessa was married to the victim.

The defendant testified that Vanessa called him on July 8 and said she had been fired from her job because she had returned late from her trip to Tennessee. He said she inquired whether she could stay with him for a while and look for a job in Tennessee. He said that he agreed and that she arrived that evening about 8:30 p.m. with a man she introduced as her husband, Armando Laredo. She said that Vanessa pulled Ms. LaBoy aside and talked to her and that Ms. LaBoy later told him that Vanessa said not to mention to the victim the other man with whom she had visited previously. She said the four of them sat around drinking beer and talking. He said that he and Vanessa walked around his garage talking and that Vanessa asked if he would teach the victim how to do automotive body repair work in his garage. He said he later went to the garage with the victim and talked to him about learning to do automotive work.

The defendant testified that a family came to visit that evening but eventually left because Vanessa kept insisting that she wanted to go fishing. He said they gathered the fishing equipment and went to a grocery store. He said Ms. LaBoy dropped them at the river and went back to the house. He said he had a rifle to kill snakes and other equipment for fishing and camping. He said they paddled down the river and went to shore to fish. He said they talked, drank beer, and ate watermelon. He said that the fish were not biting and that they decided to go downstream. He said the fishing was no better in the second location. He said that the victim and Vanessa talked in "Mexican" and that it sounded like they were arguing and discussing "Joe." He said that the victim had consumed eight to twelve beers and that he had consumed six or seven. He said that he went into the bushes to relieve himself and that Vanessa screamed for him to help her. He said he ran back and found Vanessa on the ground and the victim on top of her hitting her. He said the victim was biting Vanessa's chest. He said he was unable to pull the victim from Vanessa and hit the victim two or three times. He said he and the victim rolled around in the mud and rocks and hit each other. He said the victim got to his feet and started kicking and stomping him. He said the victim pulled a knife and said, "I'm gonna kill you and your d--- b---- of a daughter also." He said that he grabbed the hand in which the victim had the knife and that the victim started hitting him with a rock. He said that he hit the victim and that they were both bleeding. He said their struggle lasted no more than two minutes and was halted when a shot rang out and the victim fell away from him. He said he saw Vanessa with the gun in her left hand and saw the gun drop to the rocks. He said after two or three minutes, he checked the victim's pulse and found none. He said he suggested that they call the authorities, but Vanessa insisted that they not because she had an order of protection against the victim and thought the authorities would not believe them. He said that it was Vanessa's idea to put the victim in the water, and that although he disagreed, he acquiesced. He said that the two of them loaded the victim's body into the boat and that Vanessa tied rope from a tackle box to rocks. He said that he tied the ropes to the victim's body and that they pushed the body into the water. He said the victim was shot about 5:15 or 5:30 a.m.

He said Ms. LaBoy was not at the place where she was supposed to pick them up at 9:00 a.m. but eventually arrived. He said that she inquired where the victim was and that he told her something bad had happened, which he could not discuss at that time. He said they went home and unloaded the boat. He said he had to put air in the tires of the victim's car because Ms. LaBoy had let the air out of them. He denied that he admitted shooting the victim to Ms. LaBoy. He said Vanessa called her boyfriend Joel repeatedly, which he said was reflected on the telephone bill. He said he did not know what Vanessa said to Joel because she spoke in "Mexican." He said he went to bed and woke up to find Ms. LaBoy and Vanessa smoking marijuana. He said there was no discussion of disposing of evidence until later that evening. He denied burning any of the items but said that the women did so and that he hauled the ashes to the landfill.

The defendant testified that on July 10, the women suggested driving the victim's car to Chicago and abandoning it on a back street. He said that he agreed but that once they set out and stopped for gas along the way, Vanessa suggested that they do something with it there. He said he agreed because the truck was using a lot of gas. He said they took the car to a corn field. He said he poured gas on it and Ms. LaBoy started a fire. He said burning the car was Ms. LaBoy's idea.

He said the three of them went to Vanessa's apartment in Carmel, Indiana. He said that Vanessa visited Joel, that they spent the night at Vanessa's apartment, and that they gathered Vanessa's belongings. He said that they traveled home and that on the way, he threw the license plate from the victim's car off a bridge.

The defendant testified that a couple of days after returning to Tennessee, the three of them went to the river to check on the victim's body. He said Vanessa wanted him to cut off the victim's hands and head so that he could not be identified but he refused. He said he and Ms. LaBoy tied cinder blocks and rocks to the victim's body. He said he and Ms. LaBoy went to the river another time without Vanessa and Ms. LaBoy put the chain around the victim's neck. He said the lock on the chain was Ms. LaBoy's.

The defendant testified that before his arrest, Ms. LaBoy had buried the gun. He said he was home at the time but did not participate and did not know the location. He said that after he was arrested, he had a conversation with Ms. LaBoy at the jail in which she told him the authorities had searched the yard with metal detectors and dug holes but had not found the gun. He said Ms. LaBoy whispered to him about the gun's whereabouts but he could not hear her. He said that she drew a map and that he still could not understand and that he drew a map to help him understand. He said he ate the map at Ms. LaBoy's direction.

The defendant testified that he had written letters to various women while in jail. He admitted writing the letters that had been received as evidence. He acknowledged that some of the letters instructed Ms. LaBoy to testify falsely and that some of them discussed hiring a hit man. He said he was mad at Ms. LaBoy for cooperating with the state. He said he wrote the letters out of anger but "meant nothing by them." He admitted writing a letter in which he claimed Vanessa had her own gun at the river and acknowledged that this was not true. The defendant admitted his prior convictions for domestic assault and carrying a weapon in his truck.

The defendant testified that he was wearing a t-shirt that "fit pretty good" the night he went to the river with Vanessa and the victim. He denied that he was wearing a shoulder holster or a jacket. He said he did not check the night stand for his pistol before he left and did not know that Vanessa had it with her.

On cross-examination, the defendant admitted that Ms. LaBoy had not been present when the victim was killed. He stated he was unaware of any plan to kill the victim before going to the river. He said that Vanessa told him she had taken the pistol to the river just to shoot it and that he did not believe she planned to kill the victim. He denied that he told Ms. LaBoy he was going to kill the victim at the river. He admitted that he had been untruthful with Agent Vinsant when he was interviewed on July 23 by denying that he knew the victim. He said his words did not come out correctly when Agent Vinsant understood him to say Vanessa shot the victim while the victim was squatting down using the bathroom. He said what he meant to say was that the way in which Vanessa shot the victim was "s-----" but that he did not get the chance to correct himself because

Agent Vinsant walked away. The defendant admitted telling Kenneth Robbins that he had pulled the victim off Vanessa, slung him around, and “popped” him.

The defendant testified that he told Vanessa in the beginning that he would take the blame for the victim’s death because she was only twenty-two years old and had her whole life ahead of her. He said that he did not recall telling inmates Billy Gunter and Brandon Green he shot the victim. He admitted saying to inmate Mitchell Green that he had revealed the location of the weapon to someone and was concerned that person would turn it over to authorities.

Walter Jackson testified on rebuttal that he, his wife, and his toddler son went to the defendant’s house in early July 2003. He said he wanted to see about buying some automotive parts from the defendant. He estimated it was after 9:00 p.m. He said the defendant, his girlfriend, his daughter, and his daughter’s husband were at the defendant’s home. He said they stayed “[a]bout 30 minutes, maybe a little longer.” He said they left after the defendant’s daughter came out and said they had to go to the store. He said the defendant did not ask him to go fishing with them. He acknowledged having previously told counsel he did not remember what had been discussed.

After receiving the evidence, the jury found the defendant guilty of first degree murder. The trial court imposed a life sentence.

I

The defendant challenges the legality of the search which yielded the murder weapon. He argues that Ms. LaBoy did not have authority to consent to the search, which involved the authorities locating the gun inside the ammunition can, buried behind a well house at the defendant’s rented residence. The defendant also argues that even if the state established Ms. LaBoy’s authority to consent to the search, her consent did not extend to the authorities’ opening the “closed and secured” ammunition box. The state responds that Ms. LaBoy had authority to consent to the search, including authority to consent to the subterranean search.

At the suppression hearing, Detective Carson testified that he knew before the search in question that the defendant and Ms. LaBoy resided together at the residence where the gun was found. He said he knew Ms. LaBoy did not own the property. He said he did not ask her whether the defendant, who was in jail, had given her permission to allow the authorities to search the property. He acknowledged that the authorities had searched the premises a few days earlier but had not found the gun. He said that on the date in question, he went to the residence after Detective Chambers was notified by the dispatcher that Ms. LaBoy had learned the location of the gun from the defendant. He said that Ms. LaBoy directed the officers to the well house and that one of the other officers noticed a clump of earth that was loose and discovered the ammunition box underneath the clump. He said the officers had not noticed the loose clump when they executed the search warrant a few days earlier. He said the hole was about twelve inches in circumference and the top of the box was about three or four inches below ground level.

Ms. LaBoy testified that she had a key to the padlock on the front door of the house and the lock on the cable across the driveway. She said the defendant told her he did not want her to go into the garage and that she did not have a key to the garage. She said she was able to go into the yard if she so desired. She said she paid the bills with the funds from her disability check, which included rent, telephone service, and electric service.

Ms. LaBoy testified that she visited the defendant in jail on July 26, 2003, and that during the visit, the defendant drew a map of the location where he had buried the gun. She said he told her and his sister Roshonda to retrieve the gun and dispose of it. She said she went to the 9-1-1 center as soon as she left the jail and told a woman to notify the investigating officers that she knew the location of the gun. She said she drew a map for the officers of the exact location where the defendant told her the gun was buried.

The defendant testified that he had lived in the rental house where he lived with Ms. LaBoy “off and on . . . since 1964.” He said he had paid the rent for years. He said that Ms. LaBoy came to live with him in 2002 or 2003 and that she did not pay rent or utilities. He said she had a key to the front door and could walk around in the back yard. He said, however, that she did not have permission to go into the garage or back bedroom or to allow others into the back yard. He said he instructed her not to allow people into these areas.

The trial court found that the defendant had specified those areas from which Ms. LaBoy was prohibited and that the weapon was retrieved from a location that was not one of these areas. The court also found that the container from which the weapon was retrieved was closed but not locked. The court found that Ms. LaBoy had “ostensible authority” to allow the search and seizure. Thus, it denied the defendant’s motion to suppress the gun.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A similar guarantee is provided in Article 1, Section 7 of the Tennessee Constitution:

That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty.

The essence of these constitutional protections is “to ‘safeguard the privacy and security of individuals against arbitrary invasions of government officials.’” State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (quoting Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730 (1967)). Since an individual’s expectation of privacy is nowhere higher than when in his or her own home, a “basic principle of Fourth Amendment law” is “that searches and seizures inside a home without a warrant are presumptively unreasonable.” Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980) (internal quotations omitted). Under the “fruit of the poisonous tree” doctrine, evidence that is obtained through exploitation of an unlawful search or seizure must be suppressed. See Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963).

The prohibition against warrantless searches and seizures is subject only to a few specifically established and well-defined exceptions. See Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); State v. Tyler, 598 S.W.2d 798, 801 (Tenn. Crim. App. 1980). One exception to the general warrant requirement is consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973); State v. Bartram, 925 S.W.2d 227, 230 (Tenn. 1996); State v. Jackson, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993). “The sufficiency of consent depends largely upon the facts and circumstances in a particular case.” Id. In most circumstances valid consent exists when given “either by the individual whose property is searched or by a third party who possesses common authority over the premises.” State v. Ellis, 89 S.W.3d 584, 592 (Tenn. Crim. App. 2000) (citations omitted). The Supreme Court has defined common authority as the

mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 171 n.7, 94 S. Ct. 988, 993 n.7 (1974); see Bartram, 925 S.W.2d at 231. This court has previously concluded that valid consent exists if (1) the third party in fact had common authority or (2) a reasonable person, given the facts and circumstances available to the police, would have concluded “that the consenting party had authority over the premises.” Ellis, 89 S.W.3d at 593 (citing Illinois v. Rodriguez, 497 U.S. 177, 188-89, 110 S. Ct. 2793, 2801 (1990)).

On review, an appellate court may consider the evidence adduced at the suppression hearing as well as at trial in determining whether the trial court properly denied a pretrial motion to suppress. State v. Henning, 975 S.W.2d 290, 297-99 (Tenn. 1998). A trial court’s factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about the “credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact.” Odom, 928 S.W.2d at 23. The application of the law to the facts as determined by the trial court is

a question of law which we review de novo on appeal. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

The trial court accredited the state's evidence that Ms. LaBoy had authority to consent to the search. That evidence included Ms. LaBoy's testimony that the defendant had specified certain areas of the premises from which she was prohibited. The evidence demonstrated that the defendant had limited Ms. LaBoy from going into the garage, where he worked on cars, and the back bedroom, where he kept personal papers. However, the trial court accredited Ms. LaBoy's testimony that the back yard was not one of the prohibited areas. The evidence also included her testimony that the defendant told her the location of the gun and instructed her to retrieve it and dispose of it. Upon review, the evidence does not preponderate against the trial court's factual findings. Further, those factual findings support the conclusion that Ms. LaBoy's consent to search was valid. She had common authority over the area searched and the items seized.

In so holding, we reject several of the defendant's arguments. First, he argues that even if Ms. LaBoy were permitted to go into the back yard, she exceeded her authority by allowing the police to dig into the ground. However, the intrusion here was minimal, and there was no evidence Ms. LaBoy did not have authority to allow the police to pull up a loose clump of dirt covering a shallow hole that was three to four inches below the surface. Further, Ms. LaBoy testified that the defendant told her the location of the gun and directed her to retrieve and dispose of it.

We have also considered and rejected the defendant's argument that the search was not permissible based upon apparent authority because the officers did not take steps to ascertain Ms. LaBoy's authority. However, Ms. LaBoy had actual, common authority to consent to the search and seizure, and apparent authority was not required, as well. See Ellis, 89 S.W.3d at 593 (consent search permissible when person has common authority or apparent authority) (emphasis added).

We have likewise rejected the defendant's argument that the officers exceeded the extent of Ms. LaBoy's authority to consent when they opened the closed ammunition box. The trial court found that the box was closed but not locked. We believe Ms. LaBoy had authority to consent to opening the box. According to her testimony, the defendant told her to retrieve and dispose of the gun, which was inside the box. Even if the defendant's testimony is accredited, he claimed that Ms. LaBoy was the person who hid the gun. If Ms. LaBoy buried the gun and ammunition box, she had authority to consent to the box's opening.

Finally, we reject the defendant's argument that Ms. LaBoy's authority over the property derived from the defendant's, and "it is possible that as a tenant, [the defendant] may not have possessed the authority to go beneath the surface of the land or allow others to do so." The fallacy of this position is that if the defendant had no right to make the intrusion, he likewise had no standing to challenge the intrusion having been made by the authorities. See State v. Oody, 823 S.W.2d 554 (Tenn. Crim. App. 1991) (holding that defendant must have legitimate expectation of privacy in place searched to have standing to challenge the search).

II

Next, the defendant argues that the trial court erred in denying his motion for new trial based upon newly discovered evidence. He bases his bid for a new trial on five letters which he alleges were written by Vanessa Laredo. The letters provide impeachment evidence for Ms. Laredo's testimony and inculcate her and exculpate the defendant as the person who shot the victim. The state argues that the trial court properly denied the motion for new trial based upon newly discovered evidence because the letters were not credible.

"To obtain a new trial on the basis of newly discovered evidence, the defendant must establish (1) reasonable diligence in seeking the newly discovered evidence; (2) materiality of the evidence; and (3) that the evidence will likely change the result of the trial." State v. Nichols, 877 S.W.2d 722, 737 (Tenn. 1994) (citing State v. Goswick, 656 S.W.2d 355, 358-360 (Tenn. 1983)).

A new trial will not be granted on newly discovered evidence where it appears that such new evidence can have no other effect than to discredit the testimony of a witness at the original trial, contradict a witness' statements or impeach a witness, unless the testimony of the witness who is sought to be impeached was so important to the issue, and the evidence impeaching the witness was so strong and convincing that a different result at trial would necessarily follow.

State v. Rogers, 703 S.W.2d 166, 169 (Tenn. Crim. App. 1989) (citing Rosenthal v. State, 200 Tenn. 178, at 186, 292 S.W.2d 1 (1956)). If the motion is based upon controverted proof, the decision whether to grant a new trial is within the discretion of the trial court. Goswick, 656 S.W.2d at 358-59.

At the hearing on the motion for new trial, Ms. Laredo testified that she was incarcerated in the Tennessee Prison for Women on a conviction of facilitation of second degree murder and that she had written letters to a Department of Correction inmate named Robert Foster. She said she thought Mr. Foster had been in the same prison as the defendant. She said she was introduced to Mr. Foster as a pen pal through a jail inmate she met in Scott County. She identified the letters that were introduced as exhibits at the hearing as ones which she had written to Mr. Foster. She said, however, that several handwritten statements were not her handwriting. These statements tended to maximize her responsibility in the victim's killing. She identified several discrepancies in the handwriting in these statements, as compared with her own handwriting.

After the trial court received the letters and Ms. Laredo's testimony, it reviewed the transcript of the trial before denying the defendant's motion for a new trial. The court found that the letters were not credible. The court accredited the testimony of Ms. Laredo that she did not write the inculpatory portions of the letters. The court noted that the handwriting in question "is suggestive that this is . . . something below credible." The court ruled that because the evidence was not credible, there was no need to analyze whether the evidence would occasion a different result at trial.

Upon review, we conclude that the trial court did not abuse its discretion in denying the motion for a new trial. The evidence supports the trial court's determination that the letters were not credible proof. The statements in question in the letters often appear at the beginning or end of a paragraph, there are noticeable differences in the ink and handwriting in certain locations, and some of the statements are out of context of the letter. Further, we note that one of the primary purposes of the letters would be to impeach the testimony of Ms. Laredo. Given the irregularities in the letters and Ms. Laredo's claim she did not write the inculpatory portions of the letters, along with Ms. LaBoy's trial testimony that the defendant planned and later admitted shooting the victim, the defendant was not entitled to a new trial because the evidence is not so overwhelming that it would result in a different result at a new trial.

III

In his final issue, the defendant argues that the trial court erred in its midtrial change of its ruling on his motion in limine to exclude letters the defendant had written while in jail. The letters in question, which were written to the defendant's relatives, state that the defendant wanted to hire a "hit man" to kill Ms. LaBoy and Ms. Laredo, and request that the relatives obtain the funds to pay for the killings. The defendant claims that the trial court's midtrial ruling allowing admission of the letters, which was contrary to an earlier ruling, prejudiced him because he did not have adequate time to prepare for admission of the letters.

The record indicates that the trial court conducted an off-the-record, in-chambers hearing and granted the defendant's motion in limine. However, at the state's request after Ms. LaBoy's testimony, the trial court revisited its ruling, this time on the record, and denied the motion in limine. The court found that the letters were probative because they were "a statement by the defendant about issues concerning this criminal offense" and because they showed "a continuation of the act by trying to cover one's tracks." The court found that the prejudice from "the inference that he's seeking to harm a witness" was "certainly not that prejudicial."

The defendant's appellate complaint is not that the trial court erred in its analysis of the evidentiary law, but that he was prejudiced because the court reversed its previous, pre-trial ruling and did not allow a recess for the defendant to prepare for introduction of the letters. We note, however, that the defendant did not request a recess at trial, and he has cited no authority which would support a conclusion that the trial court should have granted a recess sua sponte. The defendant is not entitled to relief on this issue.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE